SELECTED DECISIONS

OF THE

NATIVE APPEAL

COURT

(North-Eastern Division)

VOLUME I

Part VI

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ERRATA.

On page 79, N.A.C. (T. & N.) 1947—Mzondeni Khate (Appellant) *v.* Qwishi Mpungose (Respondent)—substitute the existing heading by the following:—

> Practice and Procedure—Attachment—Interpleader.—Where a beast has been attached, a third person can establish his rights by way of an interpleader action and if he asserts his rights otherwise, he may be spoliated.

CASE No. 34 OF 1949.

DANIEL MBATA (Appellant) *v.* **NGALAZA MDHLULI (Respondent).**

(N.A.C. case No. 31/2/49.)

VRYHEID: Tuesday, 4th October, 1949: Before Steenkamp, President, Watson and Robertson, Members of the Court (North-Eastern Division).

Practice and Procedure—Interpleader action—Onus—Cattle in possession of claimant.

Held: That when the attached goods were found in the claimant's possession, the burden of proof is on the execution creditor to prove that notwithstanding such possession, the possessor is in fact not the owner.

Appeal from the Court of the Native Commissioner, Paulpietersburg.

Steenkamp, President (delivering the judgment of the Court):—

Steenkamp (P): (Delivering the judgment of the Court):—

This is an interpleader action and from the evidence it is clear that the cattle at the time of attachment were in possession of the claimant.

The Native Commissioner declared the cattle executable and an appeal has now been noted to this Court on the following grounds:—

(1) The onus of proving that the cattle attached were executable, the cattle not having been attached in the debtor's possession, rested on the execution creditor, and was not on the evidence adduced, discharged.

(2) In any event, even if the claimant did not establish his right to claim the cattle, the execution creditor was not thereby relieved of the burden of proof referred to in ground No. 1 hereof.

(3) The judgment is generally against the weight of the evidence and the law.

It is not quite correct for appellant in his grounds of appeal to state that the cattle, not having been attached in the debtor's possession, the onus then rests on the execution creditor. Even if goods are attached in possession of a third person, the onus still rests on the claimant *:vide* Butelezi *v.* Majozi, 1 N.E.D. 40 (1948).

In the present case, however, the cattle claimed were attached in possession of the appellant (claimant) and the Native Commissioner placed the burden of proof on him, and this Court has to decide whether he was correct.

In the case of Maluleka *v.* Mavela. 1935 N.A.C. (T. & N.) 27, it was decided that the onus is on claimant in accordance with the general rule if it be proved that cattle although attached in the possession of the claimant, were shortly before attachment, in the possession of the judgment debtor. In that case, *Martin* (*P.*) is reported to have stated:—

> " *that this vexed question of onus in interpleader actions must necessarily depend on the circumstances of each case.*"

In the later case of Msweli *v.* Msweli, 1938 N.A.C. (T. & N.) 239, at page 241, the Court per McLoughlin (P.) differed from the principles laid down in Maluleka's case and it was then decided, on the principle of the maxim " *in pari causa melior est condictio possidentis* " (in an equal case, i.e., where both parties have an equal title, the possessor is in the better position) that where the attached goods were found in the claimant's possession, the burden of proof is on the execution creditor to prove that notwithstanding such possession, the possessor is in fact not the owner.

The facts of this case are that the judgment debtor, while living on the farm of a Mr. A. M. Prinsloo for about seven years, had in his possession a number of cattle and until the time he was ejected from the farm, Mr. Prinsloo was under the impression that the cattle were the ownership of the judgment debtor, and dipping fees were paid by the judgment debtor. Mr. Prinsloo admits that during October or November 1948, six of the cattle were removed to the claimant, and that claimant informed him he had exchanged four of the cattle for four cattle of his running in the Nongoma district. Prinsloo, however, states that he claimed dipping fees from claimant for all six of the cattle. Claimant thereafter informed the Court that the evidence given by Mr. Prinsloo is correct. There remains the question whether the cattle exchanged by the execution debtor with claimant were his own property or that of his brother. The execution debtor admits that the six head of cattle attached were at one time in his possession on Prinsloo's farm but he was not the owner and he only kept them on behalf of his brother Makambini and that the dipping fees were paid to Prinsloo through him. Prinsloo would naturally not know whether the dipping fees were the debtor's money or money remitted to him by his brother Makambini.

Council for Respondent has advanced the argument that as the judgment debtor was in recent possession of the attached cattle, the onus is on the claimant that he is in fact the owner.

To define " recent possession " is not so easy. In this case the exchange between the claimant and Makambini, the brother of the judgment debtor, took place about the time the writ was issued. There is no indication in the evidence that the claimant was aware that a judgment had been given against the judgment debtor and that a writ had been issued. It was an innocent exchange in so far as the claimant is concerned and we do not think he should be penalised.

The Native Commissioner was not correct in placing the onus on the claimant. The onus, on the authorities quoted *supra*, is definitely on the execution creditor. The Native Commissioner has approached the whole case from the wrong angle, and moreover the evidence is not conclusive that the cattle do not belong to the claimant, and therefore the onus on the execution creditor not having been discharged, the cattle are not executable.

The appeal is allowed with costs and the Native Commissioner's judgment altered to read:—

" Cattle declared not executable, with costs."

For Appellant: Mr. Cox of Messrs. Henwood & Co., Vryheid.

For Respondent: Mr. Conradie of Messrs. Conradie & White, Vryheid.

Cases referred to:—

Maluleka *v.* Mavela, 1935 N.A.C. (T. & N.) 27.
Butelezi *v.* Majozi, 1 N.E.D. 40 (1948).
Msweli *v.* Msweli, 1938 N.A.C. (T. & N.) 239.

CASE No. 35 OF 1949.

NTSONJWANA MASONDO (Appellant) *v.* CHRISTINA BUTELEZI d.a. (Respondent).

(N.A.C. Case No. 29/1/49.)

VRYHEID: Tuesday, 4th October, 1949. Before Steenkamp, President, Watson and Robertson, Members of the Court (North-Eastern Division).

Law of Persons—Native woman—Locus standi in judicio—*Law of Contracts—Capacity to contract.*

Held: Plaintiff, a native woman, had no *locus standi in judicio* to deal with " mbeko " beast or to enter into any contract affecting the beast, nor may she, in her own name, sue in any action concerning the said beast.

Appeal from the Court of the Native Commissioner, Mahlabatini.

Steenkamp, President (delivering the judgment of the Court):—

The plaintiff, a Native woman, sued the defendant in her own name, before the Chief, for the return of a red cow with its calf. She was not assisted in the Chief's Court. The Chief granted judgment in her favour with costs. The defendant thereupon appealed to the Native Commissioner who dismissed the appeal and confirmed the Chief's judgment.

It is not clear from the record whether the plaintiff was assisted by her guardian when the appeal was heard by the Native Commissioner. On the first day of hearing the following entry appears on the record: "Plaintiff in person; Guardian in default." On the second day the note reads:"Plaintiff and Guardian in person."

An appeal has been noted to this Court and as the parties were unrepresented in the Native Commissioner's Court it is not necessary to include the grounds in the notice of appeal.

Counsel for appellant has, before this Court, taken two points: Firstly that the plaintiff being a woman, has no *locus standi in judicio*, and secondly that the Chief and the Native Commissioner had erred in declaring the sale invalid.

The first point taken is sound. From the record it transpires that the beast in question is what is commonly known as the "mbeko" beast—i.e. a gift by a woman's father to provide her with sustenance, *vide* Mtshali *v.* Mhlongo, 1944 N.A.C. (T. & N.) 71, at page 73. Such gifts are legalised by Section 107, of the Code which provides that when a girl enters into a customary union her father may give her goods and cattle, and such become the property of and belong to the house established by such union. In that case this Court held that the beast becomes the property of the bride's house under the control of her husband. Section 27 (2) of the Code provides that a Native female is deemed a perpetual minor in law and has no independent powers, save as to her own person and as specially provided in this Code. It is to be observed that an "ngqutu" beast may be dealt with by a woman as her own property and she may deal with that beast as she may deem fit. The same protection is not granted in respect of an "mbeko" beast, and while this beast belongs to her house, she may not deal with it as she sees fit. Only her husband or her guardian may do so.

In the present case the plaintiff had no *locus standi* to deal with this beast or to enter into any contract affecting the beast, nor may she, in her own name, sue in any action concerning the beast in question. The action, if any, could only have been brought by her guardian in his own name.

The appeal is allowed with costs and the Native Commissioner's judgment is altered to read:—

"Summons dismissed, with costs."

For Appellant: Mr. H. L. Myburgh of Messrs. Bennett & Myburgh, Vryheid.

For Respondent: In person.

Statutes, Ordinances and Proclamations referred to:—

Natal Code of Native Law (Proclamation No. 168 1932) section 27 (2).

Decided cases referred to:—

Mtshali *v.* Mhlongo, 1944 N.A.C. (T. & N.) 71.

CASE No. 36 OF 1949.

MOSES MTSHALI (Appellant) *v.* ALBERTINAH MTSHALI d.a. (Respondent.).

(N.A.C. Case No. 8/5/49.)

PIETERMARITZBURG: Tuesday, 18th October, 1949: Before Steenkamp, President, Stafford and Cowan, Members of the Court (North Eastern Division).

Divorces—Native customary unions—Natal—Reconciliation—Return of lobolo.

Held: Husband must notify father of wife that he intends seeking a divorce. The father must then endeavour to reconcile the partners.

Held: That unless the father of the woman is cited as a party, no order can be made against him for return of lobolo.

Appeal from the Court of the Native Commissioner, Estcourt.

Steenkamp, President (delivering the judgment of the Court).

Plaintiff sued his wife Albertinah Mtshali, duly assisted by Naphtali Mhlanga, for a decree of divorce and return of lobolo cattle.

In his summons plaintiff alleges that his wife deserted his kraal about three years ago and went to Durban and when he traced her, she refused to return. Further efforts to reconcile her were made on her return from Durban but they were fruitless; she refused and declared she had no love for him.

The Native Commissioner entered the following judgment:—

(1) Decree of divorce granted as prayed.

(2) Defendant No. 1 to remain under guardianship of her father until she remarries.

(3) Defendant's guardian to return four head of cattle to plaintiff.

(4) No order as to costs.

Against this judgment an appeal has been noted on the grounds that on the evidence adduced the Native Commissioner erred in giving judgment for plaintiff against both defendants—

(*a*) because there is no evidence that plaintiff complied with the requirements of section 78 (3) of the Natal Code of Native Law;

(*b*) that Naphtali Mhlanga is not properly cited and not a party to the action;

(*c*) that in any case the order handing the minor children under 10 years to plaintiff is a wrong order;

(*d*) the order for costs in a wrong order;

(*e*) that defendant Albertinah Mtshali on the evidence is entitled to judgment.

Plaintiff's evidence is very brief and reads as follows:—

> "I married Defendant No. 1 by Native Custom during 1941. I paid 7 head of cattle and nqutu beast. There are two children alive and one died. She deserted me during 1945 and she refuses to come back."

There is no evidence that he complied with section 78 (3) of the Code.

In the case of Gwala *v.* Mbambo, 1941 N.A.C. (T. & N.) 122, in which the husband sought a divorce, it was decided that as there had been no attempt at a reconciliation made by the defendant's father, the appeal is upheld with costs and the judgment is set aside and altered to read: "Defendant is absolved from the instance with costs".

There is no evidence on record in the present case that the plaintiff (husband) has notified the wife's father that he intends seeking a divorce, whose duty thereafter shall be to endeavour to reconcile the partners. The plaintiff has therefore not complied with section 78 (3) of the Code. For this reason alone he cannot succeed.

Ground (*b*) is also sound and reference to case Nkabinde *v.* Nkabinde, 1946 N.A.C. (T. & N.) 2, and Xulu *v.* Mtetwa, 1947 N.A.C. (T. & N.) 32, will show that unless the father of the woman is cited as a party, no order can be made against him for the return of lobolo. In the present appeal the woman's father is mentioned as second defendant in the body of the summons, but in the opinion of this Court, this is not sufficient, and he should have been cited as second defendant.

According to section 83 a Native Commissioner shall *inter alia* give clear and explicit orders and directions concerning the custody of the young children. This has not been done and the Native Commissioner would be well advised to comply with this direction, whenever he tries a divorce action.

The appeal is allowed with costs and the Native Commissioner's judgment is altered to read:—

" Absolution from the instance, with costs".

For Appellant: Adv. D. L. Shearer, instructed by Messrs. Hellett & de Waal, Estcourt.

For Respondent: Mr. Weinberg, instructed by J. M. K. Chadwick, Esq., Estcourt.

Statutes, Proclamations, etc., referred to:—

Sections 78 (3) and 83 of Proclamation No. 168 of 1932 (Natal Code of Native Law).

Cases referred to:—

Gwala *v.* Mbambo, 1941 N.A.C. (T. & N.) 122.
Nkabinde *v.* Nkabinde, 1946 N.A.C. (T. & N.) 2.
Xulu *v.* Mtetwa, 1947 N.A.C. (T. & N.) 32.

CASE No. 37 OF 1949.

JOSEPH GAMBU (Appellant) *v.* LOTTIE RADEBE d.a. (Respondent).

(N.A.C. case No. 2/1/49.)

PIETERMARITZBURG: Wednesday, 19th October, 1949: Before Steenkamp (President): Stafford and Cowan, Members of the Court (North-Eastern Division).

Law of Persons—Capacity to contract—Fiduciary and fidei-commissary —Native woman—Succession.

Mercantile Law—Purchase and sale—Natives—Immovable property—Law No. 12 *of* 1884 (*Natal*).

Held: That a Native woman who is emancipated in terms of section 78 of the Code of Native Law, 1891, and declared a kraalhead is entitled to exercise the privileges of a kraalhead and was no longer subject to the authority of a guardian.

Held: That it is legal for a Native woman to dispose of her inheritance since the restrictions under Act No. 7 of 1895 (Natal) had been removed by Act No. 38 of 1927.

Held: That *fidei-commissary* property may be alienated, if all the interested parties, being majors, have consented thereto.

Held: That where land has been specially surveyed as a result of a written agreement and that where a party has occupied land since 1932, it is consistent with the fact that the sale had taken place and that it can in no way be interpreted that any other type of occupation, e.g., lease, could possibly have been contemplated or read into the evidence.

Appeal from the Court of the Native Commissioner, Bergville.

Steenkamp, President (delivering the judgment of the Court).

The plaintiff sued the defendant in the Court below for " an order on the defendant to sign and execute all documents necessary to effect transfer in due and customary form of Lot No. 1, of Sub. F. of Lot No. 2, on the Zandspruit No. 4977, in extent 30 acres, situate in the County of Klip River, Province of Natal, or should she fail to do so, for an order authorising the Clerk of this Honourable Court to sign and execute the said documents, the said land having been purchased by the plaintiff from the heirs in the estate of the late Simeon Zamisa, with the consent of the usufructuary Betty Zamisa, the said fiduciary having now died, and the defendant now being unrestricted heir to the aforesaid estate, and she having promised and undertaken to pass the necessary transfer, but which promise and undertaking she refuses to implement ".

This claim is as amended.

The defendant is a widow, and it was therefore necessary in terms of the Natal Law, to appoint a *curator ad litem* to assist her in the action. After this case had been sent back by this Court, such an appointment was made and the defendant thereupon filed an amended plea. It was agreed between the parties that the evidence recorded up to that stage should be taken as evidence at the resumed hearing of the case.

The amended plea is as follows:—

(1) Defendant denies liability to effect the transfer claimed on the ground that she at no time legally agreed or consented to the sale in question, or promised and undertook to pass the transfer claimed.

Alternatively:—

(2) That the contract alleged being in respect of the purchase of immovable property is unenforceable in terms of Law No. 12 of 1884 (Natal), in that it is not evidenced by writing and that there is no satisfactory proof of part performance thereof in such a way as is inconsistent with any other reasonable conclusion that the actual existence of the contract as and between plaintiff and herself.

In the event of it being found that defendant and her co-heirs sold the property in question to plaintiff, then defendant pleads:

(3) That the sale is unenforceable on the ground that it was not for the benefit of defendant, and that, being a minor, defendant did not enter into the contract of sale with the assistance or consent of her guardian.

Alternatively:—

(4) That by a valid will made by the late Simeon Zamisa, a Native subject to the operation of Native Law, under the provisions of Act No. 7 of 1895 (later repealed), the immovable property in question was bequeathed by the said late Simeon Zamisa to his children, namely the defendant and her sisters, who were Native females subject to the Native law, and, this being the case, the alienation by defendant and her sisters, as heirs to the estate of the late Simeon Zamisa, of the immovable property in question to plaintiff is void and unenforceable in that in terms of section 9 of the said Act, the written approval of the Administrator of Native Law (the Native Commissioner, Bergville) to such alienation was a condition precedent to the said alienation and was not obtained.

Alternatively:—

(5) That the sale to plaintiff of the immovable property in question was effected by private treaty and this being the case the said sale was null and void in that the said property, having been bequeathed as aforesaid by the said late Simeon Zamisa to his children, same should in terms of section 9 of Act No. 7 of 1895 have been sold by public auction or at a valuation approved of by the Administrator of Native Law (the Native Commissioner, Bergville), which was not done.

Alternatively:—

(6) That the said sale by defendant and her co-heirs to plaintiff is null and void in that the prior approval thereof by the executors of the estate of the late Simeon Zamisa not having been obtained, and it being a direction of the said late Simeon Zamisa in his said will that his executors should approve thereof, the defendant and her co-heirs had no authority without such approval to effect the sale in question.

Alternatively:—

(7) That the defendant and her co-heirs, being minors, the sale by them of the immovable property in question to plaintiff is unenforceable in that in terms of section 87 of Act No. 24 of 1913, the authorisation of the said sale by either the Supreme Court or the Master, as the case may be, was a condition precedent to the sale and was not obtained.

Alternatively:—

(8) That plaintiff's summons is premature in that the property in question is at present still registered in the name of the late Simeon Zamisa and that transfer must be made from the latter's estate to defendant before she can comply and be called upon to comply with the Order Prayed.

Alternatively:—

(9) That the order prayed by plaintiff is in terms thereof ineffective and must be refused in that it is not indicated therein from whom and to whom transfer must be made.

Wherefore defendant prays that plaintiff's summons be dismissed with costs.

Alternatively: In the event of the aforegoing pleas not being upheld, but not otherwise, defendant pleads—

(*a*) that a fiduciary and not a usufructuary interest was conferred by the late Simeon Zamisa's will on his surviving spouse, Betty Zamisa.

(*b*) that the immovable property in question could not and did not vest in the children of the late Simeon Zamisa until the death of of the said Betty Zamisa;

(*c*) that at the time of the sale of the said immovable property to plaintiff was concluded, defendant and her sister, Ester, were the only surviving children of the said late Simeon Zamisa.

(*d*) that the sale by defendant and her sister Ester of the immovable property in question to plaintiff was one contracted jointly by them with plaintiff; defendant being liable to implement the said agreement of the sale being obliged to pass transfer to plaintiff of her half share of the said property, should she, the defendant, survive to be an heir thereof.

Should all defendant's pleas, from (1) to (9) above be dismissed, then, by virtue of the averments in this final alternative plea, defendant pleads that plaintiffis in any event entitled to claim transfer from her of only half of the said property, and that his claim for the remaining half thereof should be dismissed."

The first judgment granted by the Native Commissioner was in favour of the plaintiff. This judgment was set aside by this Court and the record returned to the Native Commissioner to supplement the record. After the amended plea had been filed and after hearing further evidence, the Native Commissioner entered judgment in favour of the defendant with costs—based on paragraphs 4 and 5 of the amended plea—and against this judgment an appeal has been noted to this Court on the following grounds:—

". . . in view of the fact that the will of the late Simeon Zamisa created a *fidei-commissum* the Native Commissioner's judgment as to the application of section 9 of Act No. 7 of 1895 was wrong. If, on the other hand his judgment as to the applicability of section 9 of Act No. 7 of 1895 was right, the judgment should have been one of absolution and not one in favour of the defendant."

It will be the function of this Court in the event of its disagreeing with the conclusions of the Native Commissioner, arrived at in his second judgment, to consider all the defences raised in the pleadings.

Although the defendant has denied certain facts as adduced by the Plaintiff, I do not think that she can be serious in her denials, as the evidence is so overwhelmingly in favour of the plaintiff that this Court has no hesitation in accepting the plaintiff's evidence. There are, however, intricate legal issues involved and these will have to be dealt with at the proper stage.

The facts of the case are that defendant's father, the late Simeon Zamisa, owned certain immovable property on the farm " Bethany " in the Upper Tugela Division, Natal (supposed to be Lot No. IV). He executed a will on the 5th November, 1902, and this will reads as follows:—

" Under the provisions and powers conferred on me by Law No. 12 of 1864, entitled a ' Law to enable certain natives to dispose of immovable property, and to regulate the devolution of immovable

property in cases of intestacy ', hereby revoke, cancel, and make void all wills, codicils, and other testamentary acts heretofore made and executed by me, and declare this to be my last will. I devise and bequeath to Betty Zamisa, my wife, my share in the farm Bethany, situated in the Upper Tugela Division (supposed to be Lot No. IV) for her lifetime.

" I further direct that on death of my wife, Betty Zamisa, and when executors consider best, this piece of land shall be sold and proceeds divided equally amongst my children then living. I appoint Abraham Mazibuko and William Tshangana Gumede, both of Bethany, as executors of my estate.

" All which, having been read over and explained to me by Douglas Gowan Giles, J.P., I declare to be may last will, desiring it to have effect as such, or a codicil or otherwise as may consist with law. " Thus done and passed at Bethany on the 5th day of November, 1902 ".

Testator died soon after, and according to a letter dated the 29th April, 1948, from the Master of the Supreme Court, the will was duly handed in at his office, but it is not stated when it was handed in. He further states in his letter that prior to 1913, executors in Natal did not have to account to the Master for the administration of the estate. The testator's wife, Betty, apparently remained in undisturbed possession of the property by virtue of her late husband's will. In 1933 a portion of this property was sold to the plaintiff with the permission of the defendant (who was at that time a married woman and supported by her husband), and of her sister, Ester, who was at that time still alive. Defendant denies that she consented, but the evidence is so overwhelming that there can be no doubt that she was a consenting party. No steps were taken to have the property transferred in the name of the plaintiff, but there is evidence that a survey was actually made and diagrams drawn up of the portion of the land he purchased.

Copy of the deed of sale between Betty Zamisa and Joseph Gambu was handed in, in respect of 15 acres of land. In this deed of sale there appears in clause 2 a reference that it is agreed that 30 acres shall be surveyed in the first instance and divided into two subdivisions of 15 acres each. This goes to prove that negotiation for the sale of a further 15 acres must have been in contemplation as alleged by the Plaintiff.

Here it is necessary to set out the deed of sale:—

" Agreement of sale and purchase made and entered into by and between Betty Zamisa of ' Bethany " district Bergville, and duly appointed kraalhead acting in her capacity as life usufructuary in the estate of the late Simeon Zamisa of ' Bethany ', Bergville, aforesaid, hereinafter referred to as the seller, and Joseph Gambu of ' Langkloof ' in the district of Bergville, aforesaid, unexempted native, hereinafter referred to as the purchaser.

" Subject to the consent of the heirs in the estate of the late Simeon Zamisa the said seller hereby sells and the said purchaser hereby purchases certain 15 acres of land being a portion of subdivision F. of Lot No. 2 in the Zand Spruit, situated in the County of Klip River, Natal, upon the following terms and conditions:—

(1) The purchase price shall be the sum of £60, being at the rate of £4 per acre, which said sum has already been paid by the purchaser to the seller.

(2) It is hereby agreed between the said parties that a joint survey shall be undertaken by which an area of 30 acres shall in the first instance be laid off from the said sub-division F. of Lot No. 2, which said area shall then be divided into two subdivisions of 15 acres each of which one sub-division shall be the property hereby purchased, the costs of survey shall be borne by the seller and the purchaser in equal proportions.

(3) The purchaser hereby agrees to pay all transfer fees, duty and expenses in connection with the transfer to him from the said estate.

(4) The purchaser is hereby entitled to possession of the said property from date hereof.

(5) The seller hereby agrees to have the estate of the late Simeon Zamisa administered as expeditiously as possible in order to place the purchaser into a position of receiving transfer at an early date.

(6) It is a special condition of this agreement and the purchaser hereby acknowledges to be aware of the fact that the said estate of Simeon Zamisa requires to be administered prior to his receiving transfer and that the sale of the said piece of land is subject to the consent of all interested parties in the estate.

Thus done and signed at Bergville, Natal, on this 18th day of March, 1933.

Betty Zamisa (her X mark).
Seller.

As witness:
J. F. Hoppe.

(Sgd.) Joseph Gambu.
Purchaser. "

There is also filed of record a deed of sale dated 31st March, 1939, between the late Betty Zamisa and one Ntabamhlope Ndhlovu. This deed of sale is also signed by the defendant, giving her consent. This goes to prove that the defendant must have been consulted and she must have given her consent to the sale of portions of this property to which she eventually became heiress.

Plaintiff has given evidence that the 30 acres of ground were surveyed and that he has been occupying these since 1932. This evidence is consistent with the fact that the sale had taken place, and in no way can it be interpreted that any other type of occupation, e.g., lease, could possibly have been contemplated or could be read into the evidence.

The amended plea will be dealt with *seriatim:*

Paragraph (1), as remarked above, cannot be seriously considered as there is sufficient evidence that the defendant consented to the sale. The question, however, does arise whether she, as a *fidei-commissary,* had the right to consent and whether her mother, who was the fiduciary, had the right to sell the property with such consent.

In the case of *re* estate of N. Meyer; 13 S.C. 2, the Court granted permission for the sale of a fidei-commissary property with the consent of the interested parties. In that case the testator in his will directed *inter alia* that his wife should, during her lifetime, have and enjoy the use of a certain house called " Fairbank ", or the rental thereof, and upon her death, the testator's daughter, Mary Ann Cecilia Meyer should have and enjoy the use of the house, and that upon her death the house should devolve upon her brothers and sisters surviving her, free of mortgage.

After the testator's death, his wife enjoyed the use of the house, and after her death, the daughter Mary Ann Cecilia similarly enjoyed it. She, in the meantime, had married but bore no children, and at the age of 54, when past child-bearing age, her surviving brothers and sisters consented to the sale of the house on condition that the proceeds be invested, and for Mary Ann Cecilia to draw the interest. The Registrar refused to effect the transfer, and on petition to the Supreme Court, an order was made authorising such sale as the parties entitled to the house in remainder had consented thereto.

This goes to prove that the defendant's mother, with the consent of the subsequent heirs, was entitled to dispose of the property bequeathed by her late husband.

Maasdorp, on page 204, volume 1, 7th edition, states:—

" The fidei-commissary property may not as a rule be alienated except for the purpose of paying the debts of the testator or the legacies left by him if there is no other property available for that purpose, or *with the consent of all the parties interested in the* fidei-commissary ".

Counsel for appellant has quoted the following cases:—

Ex parte Visagie, 1940 C.P.D. 42.

Ex parte Loewenthal, 1939 W.L.D. 78.

In Visagie's case there appears a passage on page 52 by *Davis* (*J.*) which reads as follows:—

> " The basis of these applications to Court in our law is clear. If the *fidei-commissaries* are majors then all the authorities concur in saying that they can agree to sell or mortgage the fiduciary property. If, however, some of the fiduciaries are minors (or unborn) then the Court is asked to interpose its authority and consent on their behalf ".

There is, however, the question whether the defendant, a married native woman, and her sister Ester, since deceased, could have consented, as according to the laws in force in Natal, they were minors. This question of disability will be dealt with under paragraph 3 of the plea.

The second paragraph of the plea has already been dealt with *supra* where it is stated that the part performance of this contract of sale is such that it cannot be called as being inconsistent with any other reasonable conclusion of the actual existence of the contract between plaintiff and defendant's mother, the fiduciary.

Dealing with paragraph (3) of the plea it is clear from the evidence that at the time of the sale the defendant's husband was present and gave his consent. It should be noted that he died soon after that.

Paragraphs 4 and 5 of the plea are not sound. Betty Zamisa was emancipated in terms of section 78 of the Native Code of 1891 and declared a kraal head on the 22nd July, 1932, and by virtue of this appointment, she was entitled to exercise the powers and privileges of a kraalhead and was no longer subject to the authority of a guardian.

There still remains the question whether defendant notwithstanding the consent of her guardian to the sale of the property, should also have obtained the written approval of the Administrator of Native Law in terms of section 9 of Act No. 7 of 1895. Now, Act No. 7 of 1895 ceased to have effect after the promulgation of Act No. 38 of 1927. The latter Act abolished certain restrictions imposed by the previous law and as defendant only exercised the right to dispose of her inheritance after the restrictions under Act No. 7 of 1895, had been removed by later legislation, we fail to see how she can be subject to certain restrictions which the legislature in its wisdom had seen fit to abolish.

While section 9 of Act No. 7 of 1895 provides that whenever immovable property shall be bequeathed to a native woman such bequest shall be deemed to be made to her guardian to be held in trust for her and after her death shall devolve upon the heir of the house to which she *belonged, unless otherwise directed by the will.* Well, in this case the testator did otherwise direct, viz., that the property shall be sold and the proceeds divided amongst his daughters then living. It should also be remarked that when Betty was emancipated she no longer suffered the disadvantage of being subject to a guardian and she could deal with the property to the extent permissible to a fiduciary heir subject to the *fidei-commissaries*' consent.

The property did not vest in the *fidei-commissary* until after the death of the fiduciary and at the time Betty died the restrictions imposed under Act No. 7 of 1895 had disappeared to this extent that the permission of the Administrator of native law was no longer required although she still required the consent of her guardian who was in this instance her husband. He had given his consent and in our view this was all that was necessary. Ester was a party to the transaction and her guardian was Betty in her capacity as kraal head.

The Native Commissioner based his conslusions on the assumption that prior to the promulgation of Act No. 38 of 1927, the estate had been reported to the Master and should therefore, in terms of section 23 (11) of this Act, have been admistered under Act No. 7 of 1895. He was under a misapprehension as the estate could not legally have been reported to the Master as the Administration of Estates Act

of 1913 (prior to Act No. 38 of 1927) did not apply to native estates, and there is no provision in Act No. 7 of 1895, that an estate under this Act must be administered by the Master.

Paragraph 6 of the plea raises an interesting issue. It will be noted that the late Simeon Zamisa appointed Abraham Mazibuko and William Tshangana Gumede as the executors of his estate. They were both dead at the time the sale was effected and apparently no steps were taken to have substituted executors appointed. The late Betty Zamisa administered the property herself and although the ground was never transferred to her in the office of the Registrar of Deeds, she exercised all the powers and rights of a fiduciary owner and we do not think that the omission for the appointment of substituted executors could jeopardise the plaintiff in the contract he made, especially as Betty Zamisa was appointed a kraalhead and had full power to deal with the property provided the consent of the other interested persons had been obtained. She was not subject to any disability in entering into a contract of sale of immovable property.

In our view the direction in the will was not such that at this late stage a sale could be upset by defendant, a consenting party, especially as the testator's intention was that the property should eventually be sold.

Paragraph 7 of the plea: In our view section 87 of Act No. 24 of 1913 has no application, as at the time of the sale the defendant was married and under the guardianship of her husband and therefore there was no tutor or curator in existence. Ester on her part was under the guardianship of her mother, the fiduciary heir.

Paragraph 8 of the plea is without substance and it cannot be expected that the plaintiff must wait indefinitely for the transfer of the property into his name until such time as the defendant might see fit to have the property transferred into her name. He must have some remedy and he is entitled to assert his rights, whenever he chooses to do so.

The defendant has had ample time to have taken steps to have the property transferred into her name and for her to have given the plaintiff transfer of the portions he had purchased. In fact, this is what he asks for and he is entitled to come to Court to have this done.

Paragraph 9 of the plea is not sufficient for the Court to dismiss the summons and the Court would be justified in making an order indicating in what manner the transfer should be effected.

We will now deal with the alternative plea. We quite agree that a fiduciary interest was conferred by the late Simeon Zamisa on his surviving spouse Betty, and this is conceded by council for respondent, and that the property did not vest in the children until after the death of the fiduciary, but the fact remains that the estate vested in the widow and on her death in the *fidei-commissaries*, i.e., her surviving children and as remarked before, the widow has the right to dispose of the property with the consent of the *fidei-commissaries*.

This disposes of paragraph (*b*) of the alternative plea.

Dealing with paragraphs (*c*) and (*d*) we can only state that although defendant's sister Ester was still living at the time, it cannot be overlooked that on her death, her share of the estate vested in the defendant, and the defendant cannot say that she is only entitled to half the estate. The impression we gain from the record is that Ester predeceased her mother Betty and therefore her potential rights passed to the only surviving heir, the defendant Lottie.

In view of what has been said, the Native Commissioner's judgment cannot be confirmed, and it is ordered that the appeal be and is hereby allowed, with costs, and the Native Commissioner's judgment is altered to read:—

> It is ordered that the Clerk of the Native Commissioner's Court, Bergville, in his official capacity, shall for the purpose of this case only, represent the estate of the late Simeon Zamisa and sign all the necessary documents required to effect transfer from the estate

of the late Simeon Zamisa to Joseph Gambu, of the following property and subject to the payment of succession, transfer or any other duty that might be payable, viz.:—

" Lot No. 1 of sub. F. of Lot No. 2 on the Zandspruit No. 4977, situate in the County of Klip River, Province of Natal, in extent 30 acres, as described in diagram sub vol. 907, fol. 23, dated 8th January, 1934 ".

" The Defendant to pay costs."

For Appellant: Adv. J. B. Macaulay (instructed by Messrs. Macaulay & Riddell, Ladysmith).

For Respondent: Mr. R. W. Anderson of Messrs. Lister & Lister, Pietermaritzburg.

Statutes, etc. referred to:—

Law No. 12 of 1884 (Natal), Code of Native Law No. 1891 (Natal) section 78.
Act No. 7 of 1895 (Natal), section 9.
Estates Act, No. 24 of 1913, section 87.
Act No. 38 of 1927, section 23 (11).

Decided Cases referred to:—

Re Estate of N. Meyer, 13 S.C. 2.
Ex parte Loewenthal, 1939 W.L.D. 78.
Ex parte Visagie, 1940 C.P.D. 42.

CASE No. 38 OF 1949.

AARON MBGADE (Appellant) *v.* **STEPHEN ZUMA (Respondent).**

(N.A.C. case No. 32/5/49.)

PIETERMARITZBURG: Wednesday, 19th October, 1949. Before Steenkamp, President, Stafford and Cowan, Members of the Court (North-Eastern Division).

Damages—Seduction—Onus of proof—Abduction—Girl of tender years.

Held: The onus is on Defendant to rebut the presumption that every girl is a virgin and his word alone cannot be accepted.

Held: That where a man of about 48 years abducts a girl of about 14 to 15 years, his conduct was most reprehensible, and that higher damages should have been ordered.

Appeal from the Court of the Native Commissioner, Pietermaritzburg.

Steenkamp, President (delivering the judgment of the Court):—

The plaintiff, the father of a girl by the name of Esther, sued the defendant in the Native Commissioner's Court for £50 damages suffered by him by reason of defendant having abducted Esther and having seduced her.

Defendant in his plea admits having had connection with Esther but denies that she was a virgin.

During the course of the proceedings, on application of the attorney for Plaintiff, the claim was amended to read:—

" Damages for seduction, £6, being value of the ' nqutu ' beast, and £44 in respect of damages for abduction."

Prior to this defendant had tendered £5 damages but it is not stated in the tender whether this was in respect of seduction or abduction, but seeing that he denied that Esther was a virgin, it must be accepted that the £5 was in respect of damages for abduction.

The Native Commissioner entered judgment for plaintiff for £5 damages for abduction. He dismissed the claim for seduction. Plaintiff was not satisfied with the amount awarded and has appealed to this Court on the following grounds:—

(1) The judgment of the Acting Assistant Native Commissioner is contrary to law and against the weight of evidence.
(2) The Acting Assistant Native Commissioner wrongly held that the onus was on the plaintiff to prove that his daughter was a virgin at the time of her abduction and seduction, she being an unmarried girl under the age of 16.
(3) There was ample evidence of abduction and seduction. The Acting Assistant Native Commissioner lost sight of the fact that respondent admitted the seduction and tendered £5 as damages.
(4) The amount claimed, viz., £6 for seduction and £44 for abduction were reasonable claims.

The Native Commissioner in his reasons for judgment came to the conclusion that the girl Esther was not a virgin and he bases his conclusions on the fact that plaintiff's witnesses gave conflicting evidence. He accepted the unsupported evidence of the defendant that the girl was not a virgin when he had connection with her. Defendant in his evidence states " I found Esther no longer to be a virgin. I am certain of that. I have had a lot of experience with virgins ".

Defendant has brought no evidence from other men who might have had connection with this girl prior to himself. The onus was on him to rebut the presumption that every girl is a virgin and his word alone cannot be accepted. This Court is of opinion that as he has not discharged that onus, he is liable to pay damages amounting to an " nqutu " beast.

We now come to the question of the inadequacy of the amount awarded for abduction. Plaintiff has given evidence to the effect that he was working at Ladysmith and that when he heard that his daughter had been abducted, he came to Pietermaritzburg to investigate. By that time Esther had been returned to the plaintiff's home and the Native Commissioner seems to hold the view that because Esther was a willing party to be abducted by the defendant, who it should be mentioned here is a man of the age of about 48 years and Ester a girl of about 14 or 15, this does not call for substantial damages. This Court does not agree with that, as the conduct of the defendant was most reprehensible in abducting a girl of tender years and this is a case where higher damages should have been awarded.

Argument has been advanced that this girl Esther could not have been a virgin if she allowed herself to be abducted and seduced by a man so many years older than herself. It is not the function of this Court to probe into the minds of young girls who might be led away by amorous feelings towards older men upon whom they might look as being " heroes ", and I do not think that because a girl " hero-worships " an old man, that her father should be deprived of a legitimate claim for damages.

The defendant should have known better than to have raised the passions of a girl who is going through what is termed the " dangerous age ". There was a duty on him as on any other man of that age to protect young girls, and the defendant has failed badly in this and has taken advantage of the passions of a young girl.

As remarked before, the damages awarded are inadequate and under this head of abduction this Court holds the view that an amount of £10 should have been awarded.

The appeal is allowed with costs and the Native Commissioner's judgment is altered to read as follows:—

(1) Seduction: For Plaintiff for £5.
(2) Abduction: For Plaintiff for £10.
(3) Defendant to pay costs.

For Appellant: Adv. J. D. Stalker, instructed by Messrs. Hershensohnn & Co.

For Respondent: Adv. J. H. Niehaus, instructed by Messrs. McGibbon & Brokensha.

CASE No. 39 OF 1949.

JOHN M. NTULI (Appellant) *v.* SHAKAZA NDIMANDE (Respondent).

(N.A.C. case No. 14/1/49.)

ESHOWE: Tuesday, 25th October, 1949: Before Steenkamp, President, Malcolmson and Leibbrandt, Members of the Court (North-Eastern Division).

Law of Delicts—Damages—Malicious prosecution—Essential that prosecution should have terminated in favour of plaintiff.

Held: That the plaintiff has not adduced any evidence giving an indication as to what defendant's motive might have been in instituting a false charge against the plaintiff. This is only by the way, and this Court is more concerned with the fact that the fourth essential, namely the termination of the criminal proceedings in favour of the Plaintiff, is not alleged nor is there any evidence to that effect. On the contrary, the evidence is that the criminal proceedings terminated against the plaintiff and until such time as those criminal proceedings are set aside, no civil action can be found.

Appeal from the Court of the Native Commissioner, Ingwavuma.

Steenkamp, President (delivering the judgment of the Court):—

From the record and a copy of the criminal record handed in as an exhibit, it appears that the plaintiff was convicted of stock theft on the 11th August, 1948, and sentenced to a term of imprisonment with hard labour.

The judgment and sentence were confirmed on review by the Supreme Court.

After having served his sentence the plaintiff instituted a civil action against the defendant (who was the complainant in the criminal case) and claimed £100 damages or 20 head of cattle. In his claim he alleges that the defendant gave false evidence in the criminal case and also coerced two other Crown witnesses to give similar evidence. These two Crown witnesses have now given evidence in favour of plaintiff and in their evidence they state that the defendant had forced them to give perjured evidence in the criminal case.

The basis of the plaintiff's claim is therefore an action of damages for malicious prosecution.

The Native Commissioner has entered judgment for plaintiff for £65 or 13 head of cattle, and against this judgment an appeal has been noted to this Court. Neither party was legally represented in the Court below and therefore grounds of appeal are not necessary.

The question arises whether plaintiff may sue for damages for malicious prosecution while a conviction still stands against him.

Nathan, in his "Law of Torts", 1921 Edition, lays down four requisites to found an action for malicious prosecution, the effect of which is that in order to maintain an action for malicious prosecution the plaintiff must show—

(1) the existence of the prosecution;

(2) that there was malice in instituting the criminal proceedings;

(3) that there was an absence of reasonable and probable cause for instituting the prosecution; and

(4) the termination of the criminal proceedings in favour of the Plaintiff.

The plaintiff has not adduced any evidence giving an indication as to what defendant's motive might have been in instituting a false charge against the Plaintiff. This is only by the way, and this Court is more concerned with the fact that the fourth essential, namely the termination of the criminal proceedings in favour of the plaintiff, s not alleged nor is there any evidence to that effect. On the

contrary, the evidence is that the criminal proceedings terminated against the plaintiff and until such time as those criminal proceedings are set aside, no civil action can be found.

One of the salient essentials being absent, the plaintiff cannot succeed in his action, and the appeal is accordingly allowed with costs, and the Native Commissioner's judgment is altered to read:—

" Absolution from the instance, with costs."

For Appellant: Mr. H. H. Kent, Eshowe.

Respondent in default.

CASE No. 40 OF 1949.

MBABI DHLUDHLA (Appellant) *v.* MATIFOLO NDHLOVU (Respondent).

(N.A.C. case No. 6/1/49.)

ESHOWE: Tuesday, 25th October, 1949: Before Steenkamp, President, Malcolmson and Leibbrandt, Members of the Court (North-Eastern Division).

Stock Theft:—Compensatory fine—Accused still liable for compensation claim in civil action.

Held: The Stock Theft Act, No. 26 of 1923, does not provide that the serving of a sentence should debar the complainant from exercising his Common Law rights in recovering the damage for loss sustained by the accused's wrongful action.

Held: That as Appellant in the present case has at no time been compensated for the loss of his goats, he is at liberty to sue the respondent for compensation.

Appeal from the Court of the Native Commissioner, Melmoth.

Steenkamp, President (delivering the judgment of the Court):—

The late noting of the appeal is condoned.

From the record it appears that during January, 1948, the defendant stole 39 goats, the lawful property of the plaintiff. For this theft, he was convicted and sentenced to serve a sentence of six months, imprisonment with hard labour, and in addition he was ordered to pay a compensatory fine of £35. 17s., or in default, to be imprisoned for a further four months with hard labour.

He served the full sentence, including the four months additional imprisonment with hard labour. He did *not* pay the fine imposed.

After his discharge from goal the plaintiff then sued him for the recovery of £50, being the value of the said goats. Defendant's plea to this civil summons is that as he had served the four months, imprisonment with hard labour in lieu of the value of the goats, he is not liable to compensate the plaintiff.

The attorney for plaintiff admitted that the value of the goats should only be £35. 17s. and he is applying for judgment for this amount.

The Native Commissioner upheld the defendant's plea and entered judgment for defendant with costs. Against this judgment an appeal has been noted to this Court on the ground that the Native Commissioner was wrong in finding that as the respondent has served a further sentence in lieu of paying the compensatory fine compulsorily imposed by the Court in terms of section 10 of Act No. 26 of 1923 as amended, appellant was debarred from claiming from respondent under civil law the value of the stock stolen by the defendant (respondent).

The issue in the case therefore boils down to the question as to whether a person who has served a term of imprisonment may still be held liable civilly to compensate the plaintiff for the damage he suffered by the unlawful act of the Defendant.

The Native Commissioner has referred to various cases but only the following one, viz., Rex *v.* Mbulawa Barnard, which is an Eastern District Local Division case and not reported in the regular law reports, but there is a note of this case in the Summary of Decided Cases, 1933—Case No. 19, at page 8—need be referred to. It is also reported in Prentice Hall, 1933 (1) H. 8.

In that case the complainant had applied for compensation under section 363 of the Criminal Code. The Magistrate refused to make an order for compensation and when the case was reviewed, it was returned to the Magistrate to make the necessary order for compensation. The learned Judge came to the conclusion that the complainant may execute if such an order is made, whereas, if no such order is made and only the compensatory fine under the Stock Theft Act is made, the complainant would be without a remedy if the accused chooses to undergo the term of imprisonment which was imposed upon him as an alternative to the payment of the fine. From The report in the Summary of Decided Cases and from the report as included in Prentice Hall reports, there is no indication that this aspect of the case had been argued or considered, and therefore the remarks made by the learned Judge can only be treated as an *obiter dictum* and not as a considered opinion on that aspect of the case.

On reference to section 346 of the Criminal Procedure and Evidence Act, it is found that whenever an offender is sentenced to pay a fine, the Court passing the sentence may, in its discretion, issue a warrant for the recovery of the fine, but in the present appeal there is no indication that such a warrant had ever been applied for. It is clear that the plaintiff (who was the complainant in the criminal case) did not apply for compensation, and therefore this Court has to decide whether or not the complainant may, after the accused had served his sentence, sue him civilly for the damage.

There is a case of Rex *v.* Mashack Makoba, 1940 N.P.D. 165 —also reported in the Summary of Decided Cases, 1940, No. 27, on page 21. In that case, while two accused were still serving their sentence, the complainant sued the two of them for the damage he suffered by the accuseds' actions in stealing some sheep valued at £10. 15s. Judgment was obtained in the Civil Court and an attachment was made by the Messenger of the Court, who recovered £5. 7s. 4d. It was then sought to have the alternative additional sentence imposed, proportionately reduced. The Supreme Court of Natal refused to do this, but indicated and made the suggestion that the amount of £5. 7s. 4d. should be paid into the Clerk of the Court as part of the additional fine imposed and the sentence of imprisonment could then be reduced proportionately. Nowhere was it indicated by *Hathorn* (*J.P.*) and *Selke* (*J.*) that the complainant was debarred from instituting a civil action.

The Stock Theft Act, No. 26 of 1923, does not provide that the serving of a sentence should debar the complainant from exercising his Common Law rights in recovering the damage for loss sustained by the accused's wrongful action. Unless a Statute clearly takes away a person's Common Law rights, then this Court does not see how the plaintiff in the present case can be deprived of such rights.

There is the case of Gagela *v.* Ganca, 3, Buchanan, A.C. 102. In that case the complainant was awarded, under section 17 of the Transkeian Penal Code, a portion of the fine imposed as compensation for the loss he had sustained. Complainant was not satisfied with the award made in the Criminal Court and after the accused had paid the fine, he sued for an additional amount, and the Court held that he was not debarred from doing so.

The present case may be likened to civil imprisonment orders. Although a civil debtor might serve his term of civil imprisonment in full, yet he is not exempted from liquidating the debt for which he has been imprisoned. The Magistrates' Court Act of 1917

made this clear, but as that was a statutory provision, this Court has to refer to the Common Law. Under the Common Law as applied to South Africa, a debtor could have been imprisoned until a debt is paid.

I hold the view that as complainant, i.e., the appellent in the present case, has at no time been compensated for the loss of his goats, he is at liberty to sue the respondent.

I also hold the view that the penalty of an additional sentence prescribed under the Stock Theft Act is not in lieu of any other rights the complainant might have, but rather a penalty exacted by the State from the accused for not having compensated the complainant who suffered loss.

The appeal is allowed with costs and the Native Commissioner's judgment is set aside. The record is returned to the Native Commissioner for the hearing of such evidence as either party might wish to adduce, and thereafter to give a fresh judgment.

Malcolmson (Member): I agree with the judgment.

After carefully considering the authorities I have come to the conclusion that an accused who has undergone imprisonment in lieu of a compensatory fine under section 10 of the Stock Theft Act (No. 26 of 1923) is still liable civilly under common law to compensate in damages the injured party for the injury done by him.

The general position is that the criminal responsibility of a wrongdoer is limited to his liability for the wrong done to the state, whereas the object of the civil action is to recover compensation for any loss or damage of which the wrongful act is the proximate cause.

Act 26 of 1923 in no way interferes with the common law right of the injured party to institute a civil action for compensation. At first sight it might appear that, because an accused has served a period of imprisonment in lieu of a compensatory fine he is being punished twice if thereafter he has to pay damages to the injured party. There is, however, a clear distinction between the sentence imposed for a crime and the civil liability of the wrongdoer. In the case of Rex *v.* Kleinbooi, 1937 (1) P.H., H. 13, which came on review in the E.D.L.D. before *Graham J.P.*., it was held " that an award of compensation under Section 363 was a civil, not a criminal proceeding, and was no part of the sentence. It could have no effect, therefore, in rendering a criminal sentence reviewable, differing in that respect from a compensatory fine imposed in terms of section 10, Act No. 26 of 1923, which was part of the sentence imposed, and which would have the effect, where a sentence of three months' imprisonment was given, in making such sentence reviewable ".

The compensatory fine under Act No. 26 of 1923 is, therefore, clearly part of the sentence and the fact that if recovered it would be paid to the injured party does not affect this position.

It could not have been the intention of the Legislature that a wrongdoer should be given an opportunity to avoid civil liability by serving a period of imprisonment. In my view the intention was to frame sentences in stock theft cases in such a way that pressure would be brought to bear upon a convicted person who very often would have no attachable assets, to compensate the injured party.

An interesting case is Rex *v.* Geelbooi and Jim, 1924 T.P.D. 97. In this case the Magistrate did not impose a fine under section 10 of Act 26 of 1923 because " the complainant (i.e., Vermaas) has elected to adopt remedy by civil proceedings for loss sustained." Vermaas had commenced civil proceedings for damages against the accused before their conviction and at the hearing of the criminal case did not apply for compensation under the provisions of Act No. 31 of 1917. *Van Pittius A.J.*, said: " The reason why the Legislature provided that a fine should not be imposed under section 10 of Act No. 26 of 1923 in case the owner applies for compensation under Act No. 31 of 1917, is not clear. The Magistrate does not seem to be bound to award compensation under Act No. 31 of 1917. Section 363 (4) provides that such an award may be made a civil judgment of the

Court making the award, and that it shall have the same effect as any civil judgment. But whatever might have been the intention of the Legislature, the construction of Section 10 of Act No. 26 of 1923 seems quite clear, viz., that in a case like the present, where the owner does not apply for compensation under Act No. 31 of 1917, *the Magistrate is bound to inflict a fine. The mere fact that the owner has instituted civil proceedings does not relieve the Magistrate from imposing a fine under section* 10 ".

The importance of this case is that the Court at no time questioned the right of the injured party to invoke his civil remedy by way of an action commenced even before the Court had had an opportunity to impose a compensatory fine, *clearly showing that in the view of the Court the civil rights of the injured party were in no way limited by the provisions of Act* 26 *of* 1923. If in this case the compensatory fine had been paid it would have been passed to Vermaas and his civil claim for damages and costs would have been reduced accordingly.

Section 10 (2) of Act No. 26 of 1923 provides that compensatory fines may be recovered in terms of section 346 of Act No. 31 of 1917. This gives an injured party another possible remedy and method of recovering his loss, but he is not bound to follow this procedure. It must be remembered that the civil claim of the injured party may include items not covered by a compensatory fine. For example, he may have suffered loss of earnings or incurred expenses while endeavouring to trace the missing stock. He may prove too that the stolen stock was worth more than the amount of the compensatory fine ordered in the criminal sentence even although the compensatory fine has been received by him. It must always be remembered that an award in terms of section 363 of Act No. 31 of 1917 has the effect of a civil judgment, whereas a fine imposed in terms of section 10 of the 1923 Act is part of the sentence for the crime. Section 10 is there for the possible benefit of an injured party and I cannot see that its terms give to a convicted person a defence in a civil action for damages.

Leibbrandt (Member): I concur.

For Appellant: Adv. H. H. Kent of Eshowe.

Respondent in person.

Statutes, Proclamations, etc., referred to:—

Sections 346 and 363 of Act No. 31 of 1917.
Section 10 of Act No. 26 of 1923.

Cases referred to:—

Rex *v.* Mbulawa Barnard, P. H. 1933 (1) H. 8.
Rex *v.* Mashack Makoba, 1940 N.P.D. 165.
Gagela *v.* Ganca—3 Buchanan, A.C. 102.
Rex *v.* Kleinbooi—1937 (1) P.H.H. 13.
Rex *v.* Geelbooi and Jim—1924 T.P.D. 97.

CASE No. 41 OF 1949.

PHIKALIPI GUMEDE (Appellant) *v.* MUHLE GUMEDE (Respondent).

(N.A.C. case No. 7/3/49.)

Eshowe: Tuesday, 25th October, 1949: Before Steenkamp, President, Malcolmson and Leibbrandt, Members of the Court, (North-Eastern Division).

Practice and Procedure:—Judgment—Must be delivered in open Court.

Held: That unless a judgment is delivered as laid down in Rule 7 (1) of the Native Commissioners' Court Rules, such a judgment has no force.

Appeal from the Court of the Native Commissioner, Eshowe.

Steenkamp, President (delivering the judgment of the Court):—

This is an application for condonation of the late noting of an appeal.

The grounds of the application are that on the 24th March, 1949, the Native Commissioner reserved judgment and when he had not given judgment by the 17th April, the applicant went to work but omitted to inform his attorney of record of his change of address. The result was that the attorney, after he had been notified that judgment had been given, wrote two letters to the applicant, addressed to his old address. Applicant only received those letters some months later and he then instructed his attorney to note an appeal. The time for the noting of the appeal had already expired, but nevertheless the Attorney did note the appeal and has now asked this Court to condone the late noting.

One of the grounds for the late noting of the appeal is that judgment had not been delivered in open Court. The other grounds are without substance, as it was the duty of the applicant to have kept in touch with his attorney and he only has himself to blame if letters apprising him of the result of the case did not reach him.

There is, however, the question as to whether a judgment not delivered in open Court is a proper judgment.

It was laid down in the case of Gambu *v.* Radebe—1 NED 91 (1949) that unless a judgment is delivered in open Court, such a judgment is in fact no judgment at all.

In that case the Court returned the record to the Native Commissioner's Court for the delivery in open Court of the judgment.

In the present case the Native Commissioner in his reasons, admits that the judgment may not have been delivered in open Court, but he futher states that the judgment was commumicated to applicant's attorney, who accepted it without demur.

The fact remains that a judgment not delivered in open Court may be ignored and this Court therefore holds that unless a judgment is delivered as laid down in Rule 7 (1) of the Native Commissioners' Court Rules, such a judgment has no force.

The judgment as recorded on the record is set aside and the record returned to the Native Commissioner to deliver a judgment in open Court. Thereafter the unsuccessful party is at liberty to appeal.

Following the decision of Gambu *v.* Radebe, *supra*, on the question of costs, it is ordered that appellant pays costs of appeal.

For Appellant: Mr. H. H. Kent of Eshowe.

For Respondent: P. B. Rutherfoord, Esq., of Eshowe.

Statutes, etc., referred to:—

Government Notice No. 2253 of 1928, section 7 (1).

Cases referred to:—

Gambu *v.* Radebe, 1949 N.A.C. (N.E.D.)

CASE No. 42 OF 1949.

MZIBENI SHOBEDE (Appellant) *v.* TUWA SHOBEDE (Respondent). (Respondent).

(N.A.C. case No. 27/3/49.)

Eshowe: Wednesday, 26th October, 1949: Before Steenkamp, President: Malcolmson and Leibbrandt, Members of the Court (North-Eastern Division).

Practice and Procedure—Plea of res judicata—*Judgments stand until set aside on appeal—Late noting of appeal—Condonation should be entered on the record.*

Held: That where a subsequent case is obviously between the same parties on the same cause of action and subject matter as in a previous case and where defendant is not represented, the Native Commissioner should *mero motu* advise the defendant to take a plea of *res judicata.*

Appeal from the Court of the Native Commissioner, Nkandhla.

Steenkamp, President (delivering the judgment of the Court):—

In this case there are certain complications and obscurities which require full investigation.

This Court is constrained to remark that the Acting Additional Native Commissioner has approached this case from an angle which is foreign to our conception of justice.

From the meagre information available it would appear that proceedings were instituted in the Chief's Court for 19 head of cattle and judgment was granted in favour of the present defendant. Some time later—it might have been a day later, or a year later, the plaintiff brought an action against the defendant for the same number of cattle and obtained judgment in his favour.

It would appear that the cause of action, the subject matter and the parties were the same in each case. After the second judgment was given by the Chief, the present defendant noted an appeal to the Native Commissioner, and here it is desired to stress that the appeal was in respect of the second case.

The present defendant was not represented before the Native Commissioner, and half-way through the proceedings it came to his notice that the case had previously been decided on the same issue. Instead of the Native Commissioner—which it was his duty to do—informing the defendant that he should take a plea or *res judicata*, he (the Native Commissioner) then, with the consent of the parties, treated the two cases as being brought before him on appeal. This is definitely not the correct procedure as there was no appeal noted in respect of the first case tried by the Chief and that judgment must stand until such time as a proper appeal has been noted and the judgment reversed.

There is no indication on the record as to when the judgment was delivered in the first case, and as appeals from a Chief's Court must be noted within 30 days from the date of judgment, the Native Commissioner is not permitted to hear an appeal until he has condoned the late noting.

The record is silent as to whether the late noting had been condoned.

The Native Commissioner, after all the evidence had been called, altered the two respective judgments of the Chief to "absolution judgments".

The result is that the Native Commissioner has *mero motu* dealt with a case not properly before his Court.

It is observed that the plaintiff, after the Native Commissioner had granted the absolution jugments, noted an appeal. It is not necessary to set out the grounds of appeal, as these do not cover the flagrant disregard of prescribed procedure in the Native Commissioner's Court.

The proceedings in the Native Commissioner's Court cannot be allowed to stand, and this Court—by virtue of the wide powers vested in it by Section 15 of the Native Administration Act, will have to grant relief.

The only relief possible is to set aside the proceedings in the Chief's Court in the second case, and the proceedings in the Native Commissioner's Court.

It will then be incumbent on the present plaintiff to note an appeal against the Chief's judgment in the first case, in which he was the defendant. He will, however, be faced with this difficulty that he will have to apply to the Native Commissioner for condonation of having noted an appeal against the Chief's judgment in the first case so late.

The Native Commissioner in exercising judicial discretion will have to decide whether to grant the condonation.

It is accordingly ordered that these proceedings and the proceedings in the Chief's Court in the second case be set aside.

There is the question of costs which have been unnecessarily incurred owing to the Native Commissioner not having conducted this case in the proper manner. It has been laid down by this Court on numerous occasions that it is the duty of the presiding officer to assist the parties, who are ignorant Natives. Neither party can be blamed for this state of affairs, and it is therefore ordered that each party pays his own costs.

It is advisable that if the case is brought before the Native Commissioner's Court, a different judicial officer should hear the appeal from the Chief's Court.

For Appellant: Mr. H. H. Kent, of Eshowe.

Respondent in person.

Statutes, Proclamations, etc., referred to:—

Section 15 of Act No. 38 of 1927.

CASE No. 43 OF 1949.

STANLEY MHLONGO (Appellant) *v.* LEVI V. DUBE and Another (Respondents).

(N.A.C. case No. 11/1/49.)

DURBAN: Monday, 31st October, 1949: Before Steenkamp, President, Ashton and Oftebro, Members of the Court (North-Eastern Division).

Practice and Procedure:—Condonation of late noting of appeal—Requirements—Documents not properly stamped.

Appeals—Notice of appeal not sufficiently stamped.

Held: That in applications for condonation of late noting of appeal, the supporting affidavits must cover the full period for which condonation is required, i.e., up to the time that all essential requirements for noting of an appeal have been fulfilled, e.g., security paid and notice of appeal stamped.

Held: That a notice of appeal is a record of Court and it is the duty of the Court to see that all documents requiring to be stamped, are so stamped, and that these are not valid unless stamped.

Appeal from the Court of the Native Commissioner, Verulam.

Steenkamp, President, (delivering the judgment of the Court):—

This is an application for the condonation of the late noting of an appeal.

Judgment was delivered on the 22nd June, 1949, and the appeal noted on the 16th July, 1949, but only received on the 18th July, 1949, by the Clerk of the Court, i.e., five days late. This notice of appeal was not stamped, as required by the rules, with a 7s. 6d. stamp, nor was security given as is also required by the rules. The Clerk of the Court drew the attorney's attention to the fact that—

(1) security is not given;

(2) stamps for prepayment of postage of record must be forwarded.

The attorney on the 22nd July, 1949, forwarded the security and a stamp for 2s. 6d. Subsequently another stamp for 2s. 6d. was forwarded and this was affixed to the notice of appeal and cancelled on 9th September, 1949. Application for condonation supported by affidavit was received by the Clerk of the Court at the same time he received the notice of appeal.

The affidavit covered the period to the 16th July, 1949, but no affidavit is filed to cover the period until the time the security was filed.

The notice of appeal has as yet not been stamped with a 7s. 6d. revenue stamp and the question arises whether this document is valid.

It is the duty of this Court to see that all documents are valid.

Before Counsel for appellant was called upon to argue his application for condonation, he was asked to show cause why the application should not be struck off the roll or dismissed on the grounds that—

(1) the notice of appeal is not stamped; and

(2) the affidavit does not cover the period from 16th July, 1949, to 22nd July, 1949.

Counsel then applied for *viva voce* evidence to be given on oath by the attorney of record. This Court refused the application, as in applications for condonation, affidavits should be submitted in support of the application. Permission was also asked to stamp the notice of appeal. This was refused for the reason that a notice of appeal can only be judged in the state in which it was before the Court when the parties were called upon to argue the application.

In the case of Hakimjee *v.* Paulos, 1928 N.P.D. 265, the appeal was dismissed on the grounds that the notice of appeal had not been stamped.

It is true that in that case an objection was actually taken by the respondent, but this Court holds the view that a notice of appeal is a record of Court and it is the Court's duty to see that all documents requiring to be stamped, are so stamped, and they are not valid unless stamped. This Court cannot act on documents that are not valid.

Not to deprive the appellant of any future remedy, this Court is prepared to grant leave for the renewal of the application.

It is accordingly ordered that the present application be and is hereby refused with costs on the grounds that it is not properly before the Court. Leave is granted to renew the application at the next session of this Court at Durban.

For Appellant: Adv. Schneider (instructed by Mr. L. L. Ronthal, of Johannesburg.)

For Respondents: Mr. Darby, of Messrs, Darby & Higgs, Durban.

Cases referred to:—

Hakimjee *v.* Paulos, 1928 N.P.D. 265.

CASE No. 44 OF 1949.

MPEPENI MACI (Appellant) *v.* JAMES SIBISI (Respondent).

(N.A.C. case No. 5/4/49.)

DURBAN: Wednesday, 2nd November, 1949: Before Steenkamp, President; Ashton and Oftebro, Members of the Court (North-Eastern Division).

Practice and Procedure Evidence—Recording of—Application for reasons for judgment.

Held: That when a medical practitioner is called to give evidence as to the injuries received in an assault, the judicial officer should record that such witness is a medical practitioner.

Held: That upon a request in writing a judicial officer should furnish a full written judgment giving details as to the *reasons* why he arrived at certain conclusions, and should not give his conclusions only.

Appeal from the Court of the Native Commissioner, Durban.

Steenkamp, President, (delivering the judgment of the Court):—

Plaintiff sued the defendant in the Court below for £300 damages he alleges he sustained by plaintiff having assaulted him. The Native Commissioner gave judgment for defendant and against this judgment an appeal has been noted to this Court on the following grounds:—

(1) Plaintiff sued defendant for three hundred pounds (£300.) being in respect of damages sustained by plaintiff as the result of the wrongful and unlawful assault committed by defendant upon plaintiff at the S. J. Smith Hostel, Merebank, Durban, on the 27th day of February, 1949.
(2) Defendant defended the action and alleged that he had pushed plaintiff away and had acted in self-defence.
(3) The evidence showed that defendant's allegation was untrue, and that he had unlawfully assaulted plaintiff.
(4) Defendant denied that when the pushed plaintiff that plaintiff in any way injured his right leg.
(5) The Native Commissioner erred in finding that the defendant acted purely in self-defence, as the evidence showed that the assault was unlawful and not in self-defence.
(6) The Native Commissioner should have given judgment for plaintiff as claimed with costs.

The manner in which these grounds of appeal are drawn up leaves much to be desired. Grounds Nos. 1, 2, 4 and 6 are a recapitulation of the evidence and the allegations in the summons. The only grounds that really have any bearing are Nos. 3 and 5.

This Court is also constrained to remark that the recording of the evidence is not too satisfactory, e.g., the first witness called is Simon Galoon. He is presumably a medical practitioner but the evidence does not say so, and it would have assisted this Court if immediately after the words " duly sworn states", the Native Commissioner had recorded that this witness is a medical practitioner. The evidence of the plaintiff should have been recorded as follows: After " duly sworn states " the words: " I am the Plaintiff " should have been inserted.

After judgment had been given the attorney for appellant requested the Court for reasons. The reasons given as a result of that application are so sparse that they are of no assistance to anybody, e.g., the Native Commissioner in his reasons for judgment only has two small paragraphs, namely—one which reads: " From the evidence adduced the defendant's version of the events was accepted as correct " and secondly: "As the defendant acted in self-defence he is not liable for the injury suffered by the plaintiff ". These are conclusions and not reasons for judgment and the Native Commissioner would be well advised to give the reasons why he arrived at certain conclusions.

After an appeal had been noted, the Native Commissioner gave additional grounds for arriving at certain findings. These grounds should have been given in the first instance when application was made by appellant's attorney.

From the evidence it would appear that the plaintiff went to a certain hostel where the defendant and his wife are selling and serving food at tables. The plaintiff became impatient because he had to wait his turn. The defendant states that the plaintiff was drunk and abusive and actually hit the defendant who then pushed the plaintiff and in the fall he injured his leg. Defendant further states that he did not notice at the time that plaintiff's leg had been injured, but this is quite understandable as an injury does not always show itself immediately unless it is of a very serious nature.

This Court cannot conceive that a person like the defendant, who is making his living out of the business, should, without any reason whatsoever, assault a customer and therefore the defendant's evidence rings true that the plaintiff misbehaved himself and actually assaulted the defendant who in retaliation pushed him. Plaintiff fell over a bench which was in the room where the food was being served.

Plaintiff states that he was in hospital for over three months but according to the hospital certificate he was only there three or four days, when the leg was put in plaster and he was allowed to go home. Plaintiff did not attend the hospital regularly as instructed by the doctor and therefore his injury could not have been as serious as he wants this Court to believe.

The Native Commissioner has found that the plaintiff only has himself to blame for the injury he received. Defendant acted in self-defence or sudden retaliation after being hit by the plaintiff and this Court can find no reason to hold that the Native Commissioner was wrong.

The appeal is dimissed with costs.

Ashton (Member): I concur.

Oftebro (Member): I concur, but with some hesitation. The case was badly put before the Presiding Officer and there is evidence which could have and should have been placed before him by both parties, but I cannot find that the Native Commissioner was wrong in his decision from the evidence adduced.

For Appellant: Adv. A. M. Torf, instructed by Mr. R. I. Arenstein, Durban.

For Respondent: Mr. A. D. G. Clark, for Messrs, Clark & Robbins, Durban.

CASE No. 45 OF 1949.

MLOMO JULY (Appellant) *v.* SIKATELE MDUNYELWA (Respondent).

(N.A.C. case No. 1/1/49.)

DURBAN: 2nd November, 1949: Before Steenkamp, President, Martin and Ashton, Members of the Court (North-Eastern Division).

Estoppel—Res judicata—privies—Tacit acquiescence.

Law of Agency—Agency is unknown to Natives.

Held: That for the purposes of a plea of *res judicata* the word " privy " cannot be interpreted so as to include an owner who has sisaed his cattle, and who has been deprived of such ownership as result of a judgment of a Native Chief's Court in a case wherein the sisa holder is a party but the owner is not.

Held: A sisa contract is not one in which the Law of Agency can in any circumstances be applied.

Appeal from the Court of the Native Commissioner, Harding.

Steenkamp (President), (delivering the judgment of the Court).

The plaintiff (respondent) sued the defendant (appellant) in the Native Commissioner's Court, Harding, for the delivery to him of a certain black ox or payment of its value, £15 and costs.

The facts of the case are that plaintiff sisaed a beast to one Macwelani. This beast had various increase including a black heifer which bore the black ox, now in dispute. This black ox, while in possession of Macwelani, was sold by plaintiff's father to the defendant, who went to claim it from Macwelani.

Macwelani informed plaintiff that defendant was claiming the ox and Plaintiff's reply was that his father had no authority over the ox and it must not be handed over to the defendant. Thereafter the defendant sued Macwelani before the Chief's Court for the black ox and obtained judgment and possession of the ox. This occurred about six years ago.

The Native Commissioner gave judgment in favour of the Plaintiff

Appeal has been noted to this Court on the following grounds:—

(1) The subject matter of this case had already been settled by competent judgment of the *Chief's* Court and the matter was accordingly *res judicata.*

(2) In any case, even if the beast was the property of plaintiff, he allowed the beast to be sold by the kraalhead and he stood by and took no action to vindicate his rights or intervene in the action when Macwelani was sued for delivery. Plaintiff accordingly condoned his kraalhead's action in selling the beast.

(3) On the evidence, the beast, when sold, was proved to be Mdunyelwa's (defendant's father's) property.

(4) In any case, the case was not fully investigated, and the Native Commissioner should have given an absolution judgment.

The Native Commissioner held that as plaintiff was not a party to the action before the Native Chief, the defence of *res judicata* cannot be entertained.

Counsel for appellant has argued before this Court that Macwelani was a privy to the respondent and therefore the plea of *res judicata* is a good one. In support of his argument he has quoted the case of Hiddingh *v.* Denyssen and Others, 3 S.C., at page 450. In that case it was laid down that the three requisites of a plea of *res judicata* are that the action in respect of which judgment has been given must have been between the same parties or their privies concerning the same subject matter, and founded upon the same cause of complaint as the action in which the defence is raised. He has also quoted the case of Pretorius *v.* Barkly East Divisional Council, 1914 A.D. 409. In that case it was laid down that in order to sustain a plea of *res judicata* it must be clear that the parties to the suit are the same as those in the previous suit.

In the present appeal there is no doubt that respondent was not a party in the previous action, but that does not dispose of ground (1) of the appeal, and this Court has to decide whether he was so closely associated with Macwelani that he can be called a privy.

It was also argued that appellant was an innocent purchaser and should not be made to suffer, as Macwelani was an agent acting with authority. The case of Chappell *versus* Gohl, 1928 C.P.D. 47, was quoted as an authority.

A sisa contract is not one in which the law of agency can in any circumstances be applied. Assuming for a moment there is some substance in Counsel's argument, then the Chief had no jurisdiction to try the first case as his jurisdiction is limited to matters arising out of Native Law and Custom. " Agency ", as defined in our Common Law is unknown to natives (see Stafford—page 150). From this it follows that the Chief's judgment having been given by a Court without jurisdiction, it could be treated with impugnity and a plea of *res judicata* can only be considered if the previous case had been tried by a competent Court. Section 12 (1) of Act No. 38 of 1927, lays it down that Chiefs and Headmen may only hear and determine civil claims arising out of Native Law and Custom.

It must not be overlooked that Macwelani did not sell the beast purporting that he had the right to do so, or that he was an agent of the respondent, but was deprived of possession by order of a competent Court, and it was argued that the Respondent should have intervened in the action, and by his failing to do so, he acquiesced in the judgment, especially as he failed to take any action for a period of six years. This is, however, a question to be decided under ground (2) of the notice of appeal.

" Privies " are defined in Wharton's Law Lexicon as follows:—

" *Privies:* those who are partakers or have an interest in any action or thing, or any relation to another.

They are of six kinds:—

(1) Privies in blood, such as the heir to his ancestor, or between coparceners.

(2) Privies in representation, as executors or administrators to their deceased testator or intestate.

(3) Privies in estate, as grantor and grantee, lessor and lessee, assignor and assignee, etc.

(4) Privities, in respect of contract, are personal privities, and extend only to the persons of the lessor and lessee.

(5) Privies, in respect of estate and contract together, as where the lessee assigns his interest, but the contract between lessor and lessee continues, the lessor not having accepted of the assignee.

(6) Privies in law, as the lord by escheat, a tenant by the courtesy, or in dower, the incumbent of a benefice, a husband suing or defending in right of his wife, etc. See Jac. Law Dict.; Co. Litt. 271a ".

Nathan, in his work "Common Law of South Africa", Vol. IV, page 2155, paragraph 2165, states that a principal and his agent (acting in his capacity as agent) are in law regarded as one person.

Nowhere in the definition of " privies " and in Nathan's exposition of the law can it be interpreted that the principles thereof may be extended to include in the definition of " privy " a person who has been deprived of ownership in the circumstances as disclosed in this case.

The plea of *res judicata* must therefore fail.

Ground (2) of the notice of appeal really means that the respondent is estopped from claiming the beast after it had been in appellant's possession for six years. In other words it became his duty " to speak " when Macwelani was being sued by the appellant. This might have been a sound defence provided this Court is satisfied that the respondent stood by all the time when the case between appellant and Macwelani was in progress and with full knowledge of the judgment, thereafter stood by without objecting or taking action.

There is not a tittle of evidence that this was in fact the position. The only evidence on this aspect of the case is that of Macwelani where he states that the father (Mdunyelwa) of respondent told him he had sold the ox in question to the appellant. He goes on with his evidence and states: " I refused to hand the ox over. I spoke to plaintiff (respondent) about this and he told me not to hand it over. He (respondent) said his father had no authority over the ox ".

This evidence relates to what occurred before there was a Court case between appellant and Macwelani, but there is no evidence that respondent stood by or was even aware that action had been instituted against Macwelani for the delivery of the beast. For all I know, the respondent might have left his home soon after Macwelani spoke to him and had remained away until he instituted action against the appellant. The onus was on the appellant to adduce evidence that respondent knew of the case pending before the Chief's Court or that he knew of the judgment against Macwelani for the delivery of the beast, and that notwithstanding such knowledge, he took no steps for a considerable period.

There is no doubt, and this is borne out by numerous authorities, that a person who stands by while his property is being sold and does not object, has no claim afterwards. The English principle of estoppel by conduct *in pais* has been accepted by our Courts and is a principle of the Roman Dutch Law (see Morum Bros *v.* Nepgen, 1916 C.P.D. 392), but as remarked above, there must be conclusive evidence that the respondent in this case was fully aware—from the date of judgment in the Chief's Court until he instituted action—that appellant had successfully sued for the ox and had been in possession ever since.

Dealing with ground (3), there can be no doubt that the beast when sold, was not respondent's father's (Mdunyelwa's) property. Mdunyelwa, who gave evidence on behalf of respondent first states that he acquired the ox by way of lobolo for his daughter who has since died, and that respondent without permission, took the ox to Macwelani. Under cross-examination, Mdunyelwa admits the ox was not paid to him as lobolo and that it was once respondent's property. It is therefore abundantly clear that Mdunyelwa acted against the interests and permission of his son, the true owner, by selling the ox.

Ground (4) is somewhat begging the question, as both the appellant and respondent were legally represented in the Court below and it became the duty of the respective attorneys to have investigated the case fully before the Native Commissioner.

I would have been inclined to dismiss the appeal with costs but my brother Ashton does not wish to agree to it, and I am prepared to subscribe to his views that the case should be referred back to the Native Commissioner for further evidence.

My brother Martin has already intimated in writing that the appeal should be allowed with costs and the Native Commissioner's judgment altered to one for defendant with costs to which we cannot agree.

It is accordingly ordered that the Native Commissioner's judgment be set aside and the record returned to him for the hearing of further evidence as to whether plaintiff was present when the previous case was tried and whether he had the opportunity to intervene, and whether he by conduct or otherwise acquiesced in the Chief's judgment for a period of six years or any other period. Thereafter the Native Commissioner to give a fresh judgment.

Costs of appeal and costs in the Court below to be costs in the cause.

Ashton (Member):

I concur. It is my view that there was not sufficient evidence for the Presiding Officer in the Court below to decide the issues before him.

Martin (Member) (Dissentiente).

This is an appeal from a judgment of the Native Commissioner's Court, Harding, in which judgment was given for Plaintiff (respondent) for the delivery of a certain black ox or payment of its value, £15, and costs.

The facts are that the black ox in question, the property of plaintiff, was in possession of one Macwelani under "sisa". Plaintiff's father, without the authority of plaintiff, sold this ox to defendant. Plaintiff's father went with defendant to Macwelani to enable defendant to take delivery of the ox. Macwelani refused to hand over the ox. He told plaintiff about the matter and plaintiff instructed him not to hand over the ox.

Defendant successfully sued Macwelani in the Chief's Court and obtained possession of the ox about five or six years ago. Plaintiff knew of defendant's claim to the ox as Macwelani had told him of it. Moreover, from plaintiff's evidence it appeared that he had first-hand knowledge of the proceedings in the Chief's Court, for in evidence under cross examination he said:—

> "This case was tried by the Chief Afuleni a long time ago when defendant took possession of the beast in question. Mlomo sued Macwelani before the Chief. I was not a party before the Chief. The judgment was given against Macwelani".

From this it would seem that plaintiff was present at the trial. There is nothing on record to lead one to the conclusion that the evidence quoted was hearsay.

An appeal was noted on four grounds, but only the first was argued fully at the hearing, that was the defence of *res judicata*. The trial Court had held that as plaintiff was not a party to the action before the Native Chief, the defence of *res judicata* could not succeed. Counsel for appellant argued that the rule in regard to *res judicata* not only applies to the parties themselves, but also to their privies. He quoted from Stroud's Judicial Dictionary (Second Edition), p. 1559, to show that "privy" included one who has an interest in the matter, e.g., lessor and lessee, and submitted that "sisa" was a form of lease.

Now, according to Bell's S.A. Legal Dictionary (Second Edition), the essentials of the defence of *res judicata* are—

(1) that the subject matter of the two actions is the same;
(2) that the actions are between the same parties or their representatives; and
(3) that the actions are based on the same grounds.

Then again, as regards the second essential mentioned above, Maasdorp (Fifth Edition, Volume IV, p. 224) lays it down that a principal and his agent are regarded as being the same person.

The question to be decided is whether Macwelani was the agent of plaintiff in respect of the possession and care of this ox. Macwelani held the ox under " sisa ", a custom by which A deposits livestock with B, the ownership remaining in A, the use being enjoyed by B, who is charged with the care of the livestock and has to account for them to A. The question, therefore, resolves itself to this: Can a depositor and a depositary be considered to be principal and agent? According to Maasdorp (Fifth Edition, Vol. III, p. 261) it is clear that they are treated as principal and agent, as will appear from the following quotation:—

> " Where, for instance, the principal has handed over for safe custody to a shopkeeper goods of a kind ordinarily sold in a shop, knowing that the goods would be exposed in the shop of the depositary, and the goods are afterwards sold by the depositary whilst so exposed, the principal will not be entitled to recover the goods from the purchaser who bought the goods relying on the implied authority."

(This passage is quoted for the sole purpose of showing that plaintiff and Macwelani were principal and agent. It should not be inferred that Macwelani is considered to have taken any part in the sale of the ox or that any question of implied authority arises.)

That the relationship of principal and agent existed is also shown in the present case by the action of Macwelani in telling plaintiff of the claim made by defendant, receiving plaintiff's instructions not to hand over the ox and then subsequently defending the case in the Chief's Court. In all this, Macwelani acted on behalf of plaintiff as his representative or agent.

In my opinion, the defence of *res judicata* was established. The appeal should be allowed with costs, and the judgment in the Court below changed to " claim dismissed with costs ".

For Appellant: Adv. Behrmann, instructed by H. L. Bulcock, Esq., Ixopo.

For Respondent: T. J. D'Alton, Esq., instructed by J. M. Seymour, Esq., Harding.

Statutes, Proclamations, etc., referred to:—

Section 12 (1) of Act No. 38 of 1927.

Cases referred to:—

Hiddingh *v.* Dennyssen & Others. 3 S.C., at page 450.
Pretorius *v.* Barkly East Divisional Council, 1914 A.D. 409
Morum Bros. *v.* Nepgen, 1916 C.P.D. 392.

CASE No. 46 OF 1949.

MADAMI MANASO (Appellant) *v.* WILLIAM MANASO (Respondent).

(N.A.C. case No. 78/1/49.)

PRETORIA: Monday, 5th December, 1949: Before Steenkamp, President, Ramsay and Liefeldt, Members of the Court (North Eastern Division).

Practice and Procedure—Exceptions in Native Commissioner's Courts.

Law of Persons—Native women—Locus standi in judicio *in actions regarding her late husband's estate.*

Held: Where an exception is really a plea in bar, it is permissible to take such an exception in a Native Commissioner's Court.

Held: Every native woman has a right of action, unassisted, against the guardian in her late husband's estate, to protect herself, her children and property, from improper administration.

Appeal from the Court of the Native Commissioner, Leydsdorp.

Ramsay (Member) (delivering the judgment of the Court).

The plaintiff, who is a widow, sued her guardian, the brother of her deceased husband, who had " ngenaed " her, for certain property, being the lobola paid to the defendant for the plaintiff's three daughters, plus its increase, which property the plaintiff alleged the defendant was wrongfully appropriating to his own use or disposing of.

Two of the daughters are the children of the deceased husband and the third, and also a minor boy, are the issue of the " ngena " union.

Plaintiff alleged that the defendant has driven her and her minor son from their home.

In the Court below exception was taken to the summons in the following terms:—

(1) Eiser het geen *locus standi in judicio.*

(2) Dagvaarding het nie kousaliteit nie weens—

(*a*) eiser is vrou en sy kan nie eiendom van haar kinders se lobola besit nie.

Hy opponeer die eis in dagvaarding vir *locus standi.*

(*b*) Sy het nie reg op besit van die kinders nie.

The Assistant Native Commissioner upheld the exception and plaintiff now appeals against this decision.

The matter of *locus standi* can be disposed of by quoting the following judgment in the case of Magawana *v.* Nonanti (N.A.C. 1922, page 160) which reads:—

" This is an action in which the plaintiff, a widow, sued the defendant to show cause why he should not be removed from his position as guardian of her husband's estate, and why some other fit and proper person should not be appointed in his place.

The defendant excepted to the proceedings on the ground that plaintiff, being a widow, had no right to institute the action in her own name, and that any process for the removal of defendant should be in the name of the ward Msukutu.

The Magistrate, after an amendment of the summons had been made, overruled the exception and against this ruling the defendant has appealed.

In the case of Nosentyi *v.* Makonza (1 N.A.C. 37) it was laid down that every native woman has a right of action, unassisted against the guardian in her late husband's estate, to protect herself, her children and property, from improper administration.

No reason has been advanced why this ruling should be departed from.

The appeal is dismissed with costs, and the case returned to the Magistrate to be heard on its merits ".

That case was quoted with approval in Myuyu *v.* Nobanjwa, 1947 N.A.C. (C.O.) at page 68.

It has been argued that it is not competent to take an exception in a Native Commissioner's Court but this Court wishes to make it clear that where an exception is really a plea in bar, it is permissible to do so.

These judgments dispose of the exception that there is no cause of action as it is made clear that a woman has the right to protect the interests of her children—in this case her minor son, who is the heir, by native custom, to the estate of her late husband and the owner of any lobola paid for his sisters.

The Native Commissioner's attention is invited to the case of Duba *v.* Nkosi, 1948 N.A.C. (N.E.D.) 7, in which it was laid down that Native Commissioners would be well advised to record the name of the tribe to which the respective parties belong.

The Assistant Native Commissioner in his reasons for judgment has quoted various cases but the present case can easily be distinguished from those. The cases referred to were not in respect of a woman suing her guardian for redress.

The appeal is allowed with costs and the Assistant Native Commissioner's judgment is altered to read " exception dismissed with costs ".

The record is returned to the Native Commissioner to hear the case on its merits.

For Appellant: Adv. H. H. Moll, instructed by Messrs. Mentz & Wessels, Tzaneen.

For Respondent: In default.

Cases referred to:—

Magawana *v.* Nonanti, N.A.C. 1922, page 160.
Nosentyi *v.* Makonza, 1. N.A.C. 37.
Myuyu *v.* Nobanjwa, 1947 N.A.C. (C.O.) 68.
Duba *v.* Nkosi, 1948 N.A.C. (N.E.D.) 7.

SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT

(North-Eastern Division)

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